FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2019/0448**
Property	**:**	**36 Silverthorne Loft Apartments, 400 Albany Road, London SE5 0DJ**
Applicant	**:**	**Mr Michael Comiskey**
Respondent	**:**	**Silverthorne RTM Co Limited**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge P Korn** **Mr S Mason FRICS**
Date of decision	**:**	**3rd February 2020**

DECISION

Decisions of the Tribunal

(1) Averys Property Management's estimated fees for overseeing the major works in question are higher than is reasonable. Their overall estimated fees of £16,635, representing 10% + VAT of the total estimated major works costs, should be reduced to £10,812.75 which represents 6.5% + VAT of the total estimated major works costs. The Applicant's contribution towards those estimated fees is limited to his service charge percentage of £10,812.75.

(2) The Tribunal hereby makes an order under Section 20C of the Landlord and Tenant Act 1985 that the costs (if any) incurred by the Respondent in these proceedings cannot be recovered through the service charge and an order under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that such costs cannot be recovered under the Lease as an administration charge.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the reasonableness and payability of the estimated fees of Averys Property Management for their role in connection with certain major works.

2. The relevant legal provisions are set out in the Appendix to this decision.

Paper determination

3. In its directions the Tribunal stated that the application was to be determined without a hearing unless either party requested a hearing prior to the determination. No such request has been made, and accordingly the application is being determined on the papers alone without a hearing.

The background

4. The Property is a two bedroom flat in a converted schoolhouse. The lease of the Property is dated 4th June 2003 and was originally made between London & Berkshire Properties Limited (1) and Mr Daniel Andrew Wheatley. The Applicant is the current leaseholder of the Property and the Respondent is a 'right to manage' company which has taken over the management of the building ("**the Building**") in which the Property is situated.

5. The Respondent has been through a consultation process in connection with the external repair and redecoration of the Building and has chosen Andy Maintenance Service to do the work. That company submitted the lowest of the three tenders set out in the Respondent's Notice and Statement of Estimates. That Notice also stated that the overall figure quoted by Andy Maintenance Service (and by the other tenderers) included Averys' fees of 10% plus VAT for the administration of procedures in respect of the Landlord and

Tenant Act , overseeing works, advising, health and safety and other responsibilities.

6. The Applicant's challenge is to the amount of Averys' fees. The information provided to us indicates that the works are still continuing. There is no evidence to indicate that a final account has been or could yet be submitted, and accordingly we are treating the challenge as a challenge to the estimated fees. It will be open to the Applicant (if he so wishes) also to challenge the final fees at the appropriate time, although consideration should be given as to whether it is sensible and proportionate to do so in the light of whatever information is then available to him.

Applicant's case

7. The Applicant states that part of Averys' fee relates to the section 20 consultation process, and he argues that this work should be covered by the regular management fee. He also argues that Averys lack the professional construction competence to perform an overseeing role and that the 10% figure is totally arbitrary and is not supported by a detailed breakdown. The Applicant states that the charge to him works out at £632.40.

Respondent's case

8. The Respondent has provided various copy documents and some copy correspondence but it has not provided a statement of case. The first bullet point of paragraph 7 of the Tribunal's directions states that the Respondent landlord's response to the application must include *"A statement in response to the tenant's statement of case"*, but it does not. The Respondent appears therefore to be inviting the Tribunal to infer or even guess what its case is by trawling through the various copy documents that it has supplied.

9. The Respondent states in email correspondence with the Applicant that the overall price quoted by Andy Maintenance Service includes Averys' fee. It has also supplied a copy of Averys' management agreement, presumably to show that this type of work is not included in its general annual fee. The Respondent also questions whether the amount of Averys' fee being charged to the Applicant is in fact £632.40 but it does not comment on what it considers to be the correct figure.

10. It is to be presumed that the Respondent considers Averys' fees to be reasonable, but the Respondent's justification for its presumed position has not been clearly stated. It is possible that the Respondent's case is buried somewhere within its bundle but it is not for the Tribunal to have to analyse every page in order to try to ascertain that case.

Tribunal's analysis

11. The Applicant argues that the overseeing of the major works should be covered by the general annual management fee, but we disagree. It is perfectly normal for this to be a separate cost and the management agreement does envisage this, albeit that it assumes a charge of 8% rather than 10%.

12. As for the argument that Averys lack the expertise to perform this overseeing role, the Applicant has not demonstrated that this is the case, and Averys might have an in-house specialist who is competent to perform this role. If in practice Averys is later shown to have performed the role in a sub-standard manner then at that stage it may be open to the Applicant to challenge their fees on that additional basis.

13. We do not accept the Applicant's contention that 10% is an arbitrary percentage but we do consider it to be unreasonably high. Based on the Tribunal's knowledge and experience, 10% of the total figure for a contract of this size is not unusual for the **combined** roles of preparing the specification and overseeing the works. However, the role of preparing the specification was taken on by Bishop & Associates, just leaving Averys to oversee the works. Often, in our experience, the role of overseeing the works would not be charged out at more than 5% for this size of contract, but allowing for some leeway we consider that up to 6.5% would be reasonable.

14. Accordingly, the amount payable by the Applicant towards Averys' estimated fees is limited to his service charge proportion of 6.5% of the total estimated cost of the works.

Costs

15. The Applicant has applied for an order under section 20C of the Landlord and Tenant Act 1985 (a "Section 20C Order") and an order under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (a "Paragraph 5A Order"). A Section 20C Order is an order that the whole or part of any costs incurred by the Respondent in these proceedings (if any) be irrecoverable as service charge. A Paragraph 5A Order is an order that the whole or part of any costs incurred by the Respondent in these proceedings (if any) be irrecoverable as an administration charge.

16. This case has involved a single issue. The Applicant has been successful in that we have reduced the amount significantly, and it was reasonable for the Applicant to have made the application. In addition, the Respondent has not taken the trouble to set out its response in a clear and proper manner.

17. It is unlikely that the Respondent has incurred any relevant costs, but if and to the extent that it has incurred any such costs we hereby make an order under Section 20C that those costs cannot be recovered through the service charge and we also make an order that those costs cannot be recovered under the Lease as an administration charge.

Name: Judge P Korn **Date:** 3rd February 2019

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,

(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.